142

(3)

No. 09-377

Supreme Court, U.S.
FILED
OCT 7 - 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1996

JAMES D. FAGAN, Jr.
1401 Peachtree Street, NE
Suite 238
Atlanta, GA 30309

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 1

ARGUMENT 3

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

Gardner v. Applied Geographics, Inc., 18 Mass. L. Rep. 33, 2004 WL 1588115 (Mass. Super. Ct. 2004) 7, 8

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 209 Fed. Appx. 345 (4th Cir. 2006) 2

New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. pet. pending, No. 08-1457 ..... 4, 5

Northeastern Land Services, Ltd. v. NLRB, 560 F.3d 36 (1st Cir. 2009), cert. pet. pending, No. 09-213 4

Snell Island SNF, LLC v. NLRB, 568 F.3d 410 (2nd Cir. 2009), cert. pet. pending, No. 09-328 4

STATUTES AND REGULATIONS

29 U.S.C. § 151 2

29 U.S.C. § 153(b) 5, 7

29 U.S.C. § 160(f) 4

MISCELLANEOUS

Black's Law Dictionary (9th ed. 2009) 7

Webster's II; New College Dictionary (1999) 9

IN THE
Supreme Court of the United States

No. 09-377

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LAUREL BAYE HEALTHCARE OF LAKE LANIER, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1996

United Food and Commercial Workers International Union, Local 1996 – the charging party before the National Labor Relations Board and the intervenor in the Court of Appeals – files this brief in support of the petition for a writ of certiorari.

STATEMENT

In the decision below, the District of Columbia Circuit held that "the power of the [National Labor Relations] Board to act exists [only] when the Board consists of three members" so that "the Board's ability to legally transact business" as well as any previously "delegated power to act . . . ceases when the Board's membership dips below the Board quorum of three members." Pet. App. 12a-13a. The Court of Appeals recognized that the consequence of this reading of the National Labor Relations Act is that "the Board's adjudicatory wheels grind to a halt" whenever the agency has fewer than three sitting mem-

bers. *Id.* at 14a. The circumstances of this case – which are typical of the hundreds of unfair labor practice cases decided by the NLRB since the end of 2007 when it was reduced to two members – demonstrate that this reading of the Act generates results that are not, as the court below put it, merely "inconvenient," *ibid.*, but are seriously detrimental to achieving the statutory purpose of minimizing "industrial strife" "by encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151.

The instant unfair labor practice case arose in the wake of a representation election conducted by the National Labor Relations Board on November 26, 2004 at a nursing care facility in Buford, Georgia operated by Laurel Baye Healthcare of Lake Lanier, Inc. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 209 Fed. Appx. 345, 347 (4th Cir. 2006). In that election, the nursing home employees voted by a four-to-one margin to designate United Food and Commercial Workers Local 1996 as their collective bargaining representative. *Ibid.* Despite the overwhelming margin of the vote for union representation, Laurel Bay refused to recognize Local 1996 on grounds that the Fourth Circuit, in its decision enforcing the Board's bargaining order, characterized as "woefully insufficient." *Id.* at 351.

Immediately following the election, Laurel Baye unilaterally changed the Buford employees' health insurance plan, dress code, attendance policy and vacation pay. These unilateral changes generated a second NLRB case – the instant case – and on February 29, 2008, the Board ordered Laurel Baye to, "upon the request of the Union, rescind [the] unilaterally implemented changes" and to "make bargaining unit employees whole for any losses suffered as a result of those unilateral changes, with interest."

Pet. App. 28a.

Laurel Baye refused to take either of these actions and instead challenged the Board's order in the D.C. Circuit solely on the ground that it was issued at a time when the Board had only two members. The District of Columbia Circuit refused to enforce the Board's order on the grounds that the NLRB was "not properly constituted" because it had fewer than three members and that the remaining members of the group – to which the full Board had previously delegated its authority – therefore "did not have authority to issue the order" in this case. Pet. App. 14a.

Laurel Baye's legal maneuverings have rendered void the 2004 representation election and the 2005 Fourth Circuit enforcement of the NLRB's bargaining order. The changes in health insurance benefits unilaterally implemented by the Company soon after the 2004 election increased the cost of insurance to each employee by approximately $50.00 per pay period – an amount equal to five time the hourly wage of most bargaining unit members at the time. Laurel Baye's refusal to comply with the Board's order to "rescind [the] unilaterally implemented changes" and "make bargaining unit employees whole for any losses suffered as a result of those unilateral changes," Pet. App. 28a, has made it impossible for the parties to effectively negotiate over the important issue of employee health insurance. And, the parties' inability to resolve this key issue has prevented them from reaching an overall agreement.

ARGUMENT

The certiorari petition presents a question of great practical importance concerning the National Labor Relations Board's authority to administer and enforce the National Labor Relations Act. The D.C. Circuit's holding that the NLRB loses all authority to

administer and enforce the Act – including authority that had been previously delegated in a manner expressly contemplated by the statute – during periods in which the agency has fewer than three sitting members conflicts directing with the holding of the First, Second and Seventh Circuits that NLRB authority that has been properly delegated does not lapse during that period. *Snell Island SNF, LLC v. NLRB*, 568 F.3d 410, 419-24 (2d Cir. 2009), cert. pet. pending, No. 09-328; *New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845-48 (7th Cir. 2009), cert. pet. pending, No. 08-1457; *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40-42(1st Cir. 2009), cert. pet. pending No. 09-213.

The D.C. Circuit has jurisdiction to review any decision of the NLRB, no matter where the case originates or where the parties reside. 29 U.S.C. § 160(f). Thus, the fact that the D.C. Circuit has reached a conclusion opposite to that reached by every other circuit that has considered the question creates a circuit conflict that cries out for resolution by this Court.

A. The NLRB has interpreted NLRA § 3(b) to mean that once the full Board, acting with the participation of at least three of its members, has "delegate[d] to any group of three . . . members any or all of the powers which it may itself exercise" – "two members . . . of any group [so] designated" may exercise those delegated powers during a period when the Board has three vacancies, because the statute expressly provides that "[a] vacancy on the Board shall not impair the right of th[ose] remaining members to exercise all of the powers of the Board." *See* Pet. App. 24a n. 4. As we briefly show here, the Seventh Circuit was clearly correct in concluding that "[t]he plain meaning of the statute . . . supports the NLRB's

delegation procedure" at issue in this case. *New Process Steel*, 564 F.3d at 846.

Section 3(b) of the National Labor Relations Act provides:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. * * * A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." 29 U.S.C. § 153(b).

The first sentence of NLRA § 3(b) states the Board's authority to delegate its powers to groups of its members:

> "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."

By specifying that the Board may delegate "any or *all* of the powers which it may itself exercise," the delegation provision makes particularly clear that the NLRB may delegate its full authority to a group of three or more Board members.

The third sentence of NLRA § 3(b) provides that a vacancy on the Board will not impair the right of the remaining members to exercise the Board's powers and defines what will constitute a quorum for the full Board and for designated groups of Board members:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a

quorum of any group designated pursuant to the first sentence "

The first clause of this sentence (the vacancy provision) serves to confirm that a vacancy on the Board will not impair the right of the remaining members to exercise all of the Board's powers, including the right to exercise those powers that have been delegated to a designated group of Board members.

The quorum provisions that follow are joined to the vacancy provision with an "and" to make clear that no matter how many of the Board's five seats are vacant, three members will constitute a quorum of the Board and two members will constitute a quorum of a designated group of members to which Board powers have been delegated. Thus, the quorum provisions state two quorum definitions – three members for the full Board and two members for a designated group of Board members – and does so in a way that makes it clear that each definition is distinct and independent of the other by using the phrase "except that" to separate the definition of a designated group quorum from the definition of a Board quorum.

The sum of the matter is this: The full Board may delegate "any or all of the powers which it may exercise" to "any group of three or more members." "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board," including the right to exercise all of the powers delegated to the remaining members as part of a designated group of members. And, notwithstanding that three members constitutes a quorum of the full Board, two members constitute a quorum of any designated group of members to which the Board has delegated its powers. Thus, as the NLRB and the First, Second and Seventh Circuits have concluded, the text of NLRA § 3(b) expressly provides

that, where the Board has delegated all its power to a designated three-member group and later vacancies reduce the Board's complement to two of the three members of that group, those remaining members constitute a quorum of the group with the right unimpeded by the vacancies to exercise all of the delegated power of the Board.

B. The D.C. Circuit's contrary construction of NLRA § 3(b) rests on multiple errors in its reading of the phrase in the third sentence of section 3(b) that "three members shall, at all times, constitute a quorum of the Board," 29 U.S.C. § 153(b), as a "requirement that the Board quorum requirement must be satisfied '*at all times*,'" Pet. App. at 6a (emphasis in original). The court below began by recognizing that "a three-member Board may delegate its powers to a three-member group, and this delegee group may act with two members" but then undermined that recognition by adding that the delegee group may exercise its powers only "so long as the Board quorum requirement is, 'at all times,' satisfied" by the Board having at least three sitting members. Pet. App. 7a.

First of all, the D.C. Circuit's reading improperly transforms the statute's definition of what constitutes a Board quorum into a minimum membership requirement that must be satisfied at all times for any powers of the Board – including those powers that the Board has delegated to a designated group of members – to be exercised.

A quorum definition does not, however, state a minimum membership requirement. Rather, a quorum is "the minimum number of members (usu[ally] a majority of all members) who must be present for a deliberative assembly to legally transact business." *Black's Law Dictionary* 1370 (9th ed. 2009). "The purpose of a quorum requirement is to insure that a

certain number of persons shall convene and transact the business at hand." *Gardner v. Applied Geographics, Inc.*, 18 Mass. L. Rep. 33, 2004 WL 1588115, at *4 (Mass. Super. Ct. 2004).

Given the meaning of the term "quorum," the D.C. Circuit could not be more wrong in its assertion that "the Board and delegee group quorum requirements are not mutually exclusive." Pet. App. 6a. The question of whether the Board has a quorum only arises when the full Board undertakes to transact business. But with respect to the exercise of powers that have been delegated to a group of Board members, it is the designated group and not the full Board that is transacting business. Thus, with respect to any particular piece of business there will never be an occasion for both the Board and the group quorum definitions to apply, because it will either be the full Board or the designated group – but not both – that is transacting the business in question. This common sense point is reflected in the fact that the full Board quorum definition and the group quorum definition are separated by the phrase "except that," which clearly indicates that the group quorum definition is an exception to the Board quorum definition.

The D.C. Circuit's reliance on the phrase "at all times" in § 3 (b) as a means for transforming the definition of a Board quorum into a minimum membership requirement is misplaced. For the Court of Appeals took that phrase entirely out of its statutory context. The relevant statutory context is this:

> "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, ..."

The principal meaning of the word "constitute" is "to make up." *Webster's II; New College Dictionary* 241 (1999). That is obviously the sense in which that word is used in the third sentence of NLRA § 3(b). The quorum clause is joined to the vacancy clause by the conjunction "and" in order to establish that no matter how many Board vacancies there may be, three members "shall, at all times, constitute a quorum." Without this specification, the normal understanding would be that a simple majority of the sitting Board members constitutes a quorum. *See* Pet. App. 8a ("Quorums . . . are usually majorities."). Thus, the point of the specification that "three members of the Board shall, at all times, constitute a quorum" is that, regardless of how many Board seats are filled, it takes three Board members to make up a quorum of the full Board. The statutory language most certainly does *not*, as the D.C. Circuit would have it, "impose[] a requirement for a three-member quorum 'at all times'" in the sense that the Board must be populated by three sitting members "at all times" in order for a designated group of Board members to exercise delegated Board powers.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the D.C. Circuit should be reversed.

Respectfully submitted,

JAMES D. FAGAN, Jr.
1401 Peachtree Street, NE
Suite 238
Atlanta, GA 30309

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337